

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CIANI NATAI BOSTIC,)
)
Plaintiff,) 03:10-cv-01153-HU
)
vs.) **FINDINGS AND**
) **RECOMMENDATION**
)
MICHAEL J. ASTRUE,)
)
Commissioner of Social Security,)
)
Defendant.)

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1 - FINDINGS AND RECOMMENDATIONS

1 HUBEL, J.,

2 Before the court is plaintiff Ciani Natai Bostic's
3 ("Plaintiff") stipulated motion for attorney's fees under the Equal
4 Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Plaintiff's
5 counsel seeks approval of an EAJA award in the amount of \$5,600.00.
6 For the reasons set forth below, Plaintiff's motion (Docket No. 23)
7 for EAJA fees should be **GRANTED**.

8 ***I. PROCEDURAL BACKGROUND***

9 Plaintiff filed this action on September 22, 2010, seeking
10 judicial review of the Commissioner of Social Security's
11 ("Commissioner") denial of her application for Supplemental
12 Security Income ("SSI") disability payments under Title XVI of the
13 Social Security Act. In her opening brief, filed on July 19, 2011,
14 Plaintiff asserted six grounds upon which the Administrative Law
15 Judge's ("ALJ") decision should be reversed: (1) the ALJ's Step Two
16 and Three findings were incomplete; (2) the ALJ's residual
17 functional capacity ("RFC") assessment was incomplete; (3) the ALJ
18 inadequately considered the opinion of an examining psychiatrist
19 (Dr. Spendal); (4) the ALJ's adverse credibility determination was
20 improper; (5) the ALJ improperly rejected lay witness testimony;
21 and (6) the Vocational Expert ("VE") hypothetical was incomplete.

22 In my February 8, 2012 Findings and Recommendations, I
23 recommended that the case be remanded to the Commissioner for
24 further administrative proceedings because (1) the ALJ failed to
25 present specific and legitimate reasons supported by substantial
26 evidence in the record for rejecting Dr. Spendal's opinion; (2) the
27 ALJ improperly discounted Plaintiff's testimony; (3) the ALJ
28 improperly disregarded lay testimony from Plaintiff's mother; and

(4) the hypotheticals posed to the VE failed to take into account all of Plaintiff's limitations. No objections were filed the parties and, on March 9, 2012, Judge Mosman adopted my Findings and Recommendations as his own. Judgment was entered the following day.

II. DISCUSSION

EAJA requires an award of attorneys' fees to a prevailing plaintiff in a Social Security appeal, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d). In this case, it is apparent Plaintiff was the prevailing party and the Commissioner's position was not substantially justified. See *Olive v. Comm'r Soc. Sec.*, 534 F. Supp. 2d 756, 758 (N.D. Ohio 2008) (recognizing that a social security claimant who obtains a remand order pursuant to sentence four of § 405(g) is a "prevailing party" for purposes of EAJA); *Ward v. Astrue*, 2012 WL 1820579, at *1 (M.D. Fla. May 18, 2012) (noting that the Commissioner in effect concedes his position was not "substantially justified" by stipulating to remand and not opposing a request for EAJA fees). Nevertheless, even absent specific objections by the opposing party, the court has an independent duty to scrutinize a fee request to determine its reasonableness. *Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9th Cir. 1993).

According to the Supreme Court, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), which results in a "lodestar." *Webb v. Ada County, Idaho*,

1 195 F.3d 524, 527 (9th Cir. 1999) (citation omitted). The district
2 court enjoys "considerable discretion" in determining what
3 attorneys' fee is reasonable and "may downwardly adjust either the
4 components of the lodestar or the lodestar itself to reflect the
5 results obtained." *Id.*

6 The time records submitted with Plaintiff's motion indicate
7 that attorney Linda Ziskin expended 32 hours on this case (1.20
8 hours in 2010; 29.70 hours in 2011; and 1.10 hours in 2012). The
9 majority of Ziskin's time was spent reviewing the 937-page
10 transcript (well above the average length of 500-600 pages) and
11 drafting, editing and finalizing her 20-page opening brief and 5-
12 page reply brief. Attorney Richard Sly also expended 3.20 hours on
13 this case (1.30 hours in 2010; 1.30 hours in 2011; and 0.60 hours
14 in 2012). Sly's time was spent on eliciting information from
15 Plaintiff's mother and keeping Plaintiff informed as to the status
16 of her case. This court recognizes a range of 20-40 hours to be "a
17 reasonable amount of time to spend on a social security disability
18 case that does not present particular difficulty." *Harden v.*
19 *Comm'r Soc. Sec. Admin.*, 497 F. Supp. 2d 1214, 1215-16 (D. Or.
20 2007). Although the combined hours claimed by Ziskin and Sly are
21 on the high end of the *Harden* spectrum, I do not believe a downward
22 adjustment is necessary because (1) the Government contested this
23 case up until I filed my Findings and Recommendation, as opposed to
24 simply stipulating to remand; (2) Plaintiff's counsel had to review
25 a rather lengthy transcript; and (3) Plaintiff's counsel filed two
26 briefs in this court which contributed to the positive result
27 achieved.

1 In considering the applicable hourly rate, the statute itself
 2 sets a \$125 per hour ceiling "unless the court determines that an
 3 increase in the cost of living . . . justifies a higher fee." 28
 4 U.S.C. § 2412(d)(2)(A). To adjust for the cost of living, the
 5 Ninth Circuit applies the national Consumer Price Index for All
 6 Urban Consumers (the "CPI-U"), not seasonally adjusted, and
 7 applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93
 8 (9th Cir. 1993). The cost-of-living increase is "calculated by
 9 multiplying the \$125 statutory maximum hourly rate by the . . .
 10 CPI-U for the years in which the attorney's work was performed and
 11 dividing by the CPI-U figure for March 1996 (155.7), the effective
 12 date of the statutory maximum hourly rate." *Nadarajah v. Holder*,
 13 569 F.3d 906, 918 (9th Cir.2009) (citing *Thangaraja v. Gonzales*,
 14 428 F.3d 870, 876-77 (9th Cir.2005)).

15 The EAJA-adjusted hourly rate for 2010 is \$175.06;¹ for 2011
 16 is 180.59;² and for 2012 is 184.50.³ Multiplying Ziskin and Sly's
 17 requested hours for the respective years results in attorney fees
 18 of \$437.65 for 2010 (2.50 hour x \$175.06); \$5,598.29 for 2011
 19 (31.00 hours x \$180.59); and \$313.65 for 2012 (1.70 hours x
 20 \$184.50); for a total of \$6,349.59 for all three years. This
 21 amount is \$749.59 more than the \$5,600.00 requested in Plaintiff's
 22 counsel's stipulated motion for EAJA fees. No further reduction is
 23 necessary.

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26 ¹ \$125 x (2010 annual index of 218.056/155.7)= \$175.06.

27 ² \$125 x (2011 annual index of 224.943/155.7)= \$180.59.

28 ³ \$125 x (2012 annual index of 229.815/155.7)= \$184.50.

1 **III. CONCLUSION**

2 Based on the foregoing reasons, Plaintiff's stipulated motion
3 (Docket No. 23) for EAJA fees should be **GRANTED**. Plaintiff's
4 counsel should be awarded \$5,600.00 in EAJA fees.

5 **IV. SCHEDULING ORDER**

6 The Findings and Recommendation will be referred to a district
7 judge. Objections, if any, are due **October 8, 2012**. If no
8 objections are filed, then the Findings and Recommendation will go
9 under advisement on that date. If objections are filed, then a
10 response is due **October 25, 2012**. When the response is due or
11 filed, whichever date is earlier, the Findings and Recommendation
12 will go under advisement.

13 Dated this 18th day of September, 2012.

14 /s/ Dennis J. Hubel

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16 DENNIS J. HUBEL
17 United States Magistrate Judge
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